

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

KIMBRA CRISWELL	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 05-00321 GMS
	:	
LYDIA ADAIR MCFADDEN	:	JURY TRIAL DEMANDED
	:	
and	:	
	:	
CHRISTIANA CARE HEALTH	:	
SERVICES, INC.,	:	
	:	
Defendants.	:	

**APPENDIX TO PLAINTIFF'S ANSWERING BRIEF
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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September 6, 2005

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Exhibit A



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KIMBRA CRISWELL

Plaintiff,

vs.

LYDIA ADAIR MCFADDEN
and
CHRISTIANA HOSPITAL

Defendants.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
MAY TERM, 2004

Docket No. 002750

CIVIL ACTION – LAW

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' PRELIMINARY OBJECTIONS
TO IMPROPER PERSONAL JURISDICTION AND VENUE

I. INTRODUCTION

Defendants have filed Preliminary Objections to Improper Jurisdiction and Venue claiming that Defendant Christiana Care Health Services, Inc. does not conduct regular and continuous business within the County of Philadelphia and the Commonwealth of Pennsylvania.

On August 5, 2004, the Court heard oral argument on Defendants' Motion, and ordered that discovery be conducted on the venue issue. On September 14, 2004 Plaintiff's counsel took the deposition of Buddy Elmore, Corporate Designee of Christiana Health Services. Mr. Elmore's testimony, as discussed below, establishes

regularly conducted, quality and quantity business activities by the Defendant in Philadelphia County. As such, Defendant's Motion must be denied.

II. Argument.

A. The Christiana Care Health System/Jefferson Health System, LLC.

Christiana Care Corporation is the parent of Defendant, Christiana Health Services. See Deposition of Elmore at 11 attached as Exhibit "A". Defendant Christiana Hospital is owned 100% by Christiana Health Services. See Elmore at 25, attached as Exhibit "A". In the summer of 1999, Christiana Care Corp. established and incorporated The Christiana Care Health System/Jefferson Health System, LLC. The LLC was registered to do business in Pennsylvania with the Pennsylvania Corporation Bureau. See Elmore at 37-38, attached hereto as Exhibit "A". The business objective of the Jefferson/Christiana LLC (hereinafter "The LLC") was to establish a joint venture between Jefferson Health Systems and Christiana to provide medical equipment and home care services. There were four members of Christiana and four members of Jefferson on the Board. Christiana and Jefferson each owned a 50% interest in the LLC; and each health care provider contributed \$25,000.00. See Elmore at 31-35, attached hereto as Exhibit "A". The joint venture was to provide home services and medical equipment to pediatric patients who had been discharged from Dupont's Children's Hospital, **including Pennsylvania residents.** See Elmore at 36, attached hereto as Exhibit "A". A facility was established in Radnor, PA at the offices of Jefferson Health System, the registered address of the LLC. If a child was discharged from Dupont certain insurance carriers would have **authorized Jefferson nurses to come to the child's home.** Additionally, if a **Pennsylvania health insurance provider had a Pennsylvania**

resident, the medical equipment would have come from **Jefferson**. See Elmore at 40-41, attached hereto as Exhibit "A". Additionally, during the year and a half after the LLC was incorporated, there were meetings attended by both the Jefferson and Christiana Nurses' Association and home care medical equipment divisions discussing the business plan which were held in **both Wilmington and Jefferson Health Systems' office in Radnor**. See Elmore at 48-49, attached hereto as Exhibit "A". In fact, according to Elmore, the Chief Operating Officer of Christiana, Ronda Ketcham, was present at these meetings between the two medical providers. See Elmore at 50-52, attached hereto as Exhibit "A". Mr. Elmore himself rotated between the Delaware and Radnor offices. See Elmore at 53, attached hereto as Exhibit "A".

Accordingly, Christiana and Jefferson anticipated and commenced a significant joint business venture sharing financial, personnel and administrative commitments between the two medical providers **to the benefit of patients in Southeastern Pennsylvania and Philadelphia, in furtherance of the business objective of the LLC**. These contacts alone are more than sufficient to establish Christiana conducting business in Pennsylvania/Philadelphia. However, as will be discussed infra there is much more.

B. The Mid Atlantic Health Plan.

Christiana Care Corp., the parent of Defendant Christiana Health Services, owns Mid Atlantic Health Plan, a health insurance plan sold to employers for their employee health benefits. Mid Atlantic has health care provider contracts with, Crozer Chester, **Jefferson**, and **The Hospital of the University of Pennsylvania**. Specifically, as to **HUP**, Mid Atlantic contracts to insure heart and organ transplants performed there. See Elmore at 56-58, attached hereto as Exhibit "A".

In addition to hospitals in Philadelphia, there are **200 to 600 physicians practices in Philadelphia alone with which Mid Atlantic has contracts.** See Elmore at 59-60, attached hereto as Exhibit "A".

Most significantly, according to Mr. Elmore, **10%** of Mid Atlantic's billings come from Pennsylvania physicians and hospitals. See Elmore at 65-66, attached hereto as Exhibit "A".

Accordingly, Christiana Corp., parent and sole owner of the Defendant, Christiana Health Services owns a health insurance plan which derives **10%** of its revenue from hospitals and 200-600 physician's practices in Philadelphia. This alone establishes regular and continuous quality and quantity business contacts with Philadelphia. However, as will be discussed, infra, there is even more.

C. The Christiana/Jefferson Medical College Teaching Faculty and Resident Exchange.

Jefferson Medical College clinical students rotate regularly to Christiana and Wilmington Hospitals. However, while Christiana and Wilmington Hospitals do not have a medical school, Christiana it has its own community teaching residency program with over 200 residents. See Elmore at 75-78, attached hereto as Exhibit "A". According to Mr. Elmore, these Christiana residents may rotate to **Jefferson** for classes or specific services. See Elmore at 78, attached hereto as Exhibit "A". Some Christiana faculty teaching at the community residence program have faculty appointments at Jefferson Medical College. See Elmore at 79, attached hereto as Exhibit "A". Christiana itself employs physicians, some of whom are involved in medical education. According to Mr. Elmore, those Christiana employed physicians probably have teaching appointments at

Jefferson or other Philadelphia hospitals. See Elmore at 83-84, attached hereto as Exhibit "A".

Therefore, the Christiana/Jefferson resident and faculty program is not unilateral. Christiana employed physicians teach at Jefferson Medical College; Christiana residents rotate there. These activities are occurring not in Delaware but in Philadelphia County, all in furtherance of the business objective of Christiana in providing medical care to their patients through the education of the residents in the community teaching program.

III. Conclusion.

Through the establishment of the Christiana/Jefferson LLC's joint business venture to provide home care and equipment to Philadelphia patients; through the 10% of the Mid Atlantic Health Plan's revenue generated by the 200-600 Philadelphia physicians and two hospitals which participate in Christiana Care's Health Plan, and through Christiana's physicians teaching and its residents participating in classes and services at Jefferson Medical College, there is and has been the quality and quantity of business contacts with Philadelphia, which establishes proper venue in Philadelphia County.

WHEREFORE, Plaintiff, Kimbra Criswell, respectfully requests that Defendants' Preliminary Objections be **DENIED**.

KATS, JAMISON, van der VEEN &
ASSOCIATES

Dated: 9/27/04



NELSON LEVIN, ESQUIRE
Attorney for Plaintiff

ILMORE

1 You're giving me a one-page document. Is
2 this it?

3 A. That's it.

4 Q. Now, my understanding is
5 that Christiana Health Services, and for
6 the purposes of this deposition because
7 there's a few Christiana entities
8 involved, let's just call it Health
9 Services, is that fair? So when I say
10 Health Services, you'll know what I mean?

11 MR. BALAGUER: Using Health
12 Services to be Christiana Care
13 Health Services?

14 MR. LEVIN: Yes.

15 THE WITNESS: Oh, Health
16 Services, that's fine.

17 BY MR. LEVIN:

18 Q. Now, my understanding is
19 that there is a legal entity called
20 Christiana Care Corporation; is that
21 correct?

22 A. Yes, there is.

23 Q. Christiana Care Corporation
24 is the parent of Health Services?

ELMORE

1 Q. Since the late '90s your
2 testimony is that Health Services has
3 employed no physicians that practice
4 medicine in the Commonwealth in
5 Pennsylvania?

6 A. Yes, they have not
7 practiced.

8 Q. No?

9 A. The answer is, there's no
10 additional physicians that practice in
11 Pennsylvania.

12 Q. Christiana Hospital is owned
13 a hundred percent by Health Services?

14 A. Yes.

15 Q. In 2002 does Health Services
16 own any property in the Commonwealth of
17 Pennsylvania?

18 A. No.

19 Q. Currently does Health
20 Services own any property in the
21 Commonwealth of Pennsylvania?

22 A. No.

23 Q. In 2002 did Health Services
24 own or operate any medical facilities in

EDMORE

1 A. What time is that question?

2 Q. Let's start with today.

3 A. No.

4 Q. Let's go back to 2002.

5 A. No.

6 Q. Prior to 2002?

7 A. Health Services? No.

8 Q. The way you answer that
9 question, you were thinking Health
10 Services, no. Was there another entity
11 that came under the Christiana Care
12 Corporation umbrella that prior to 2002
13 in furthering its business objective had
14 a relationship with any medical providers
15 in Pennsylvania?

16 MR. BALAGUER: Just object
17 to the form of the question, but
18 you can answer it.

19 BY MR. LEVIN:

20 Q. If you can understand.

21 A. There's no affiliated other
22 division but the parent itself. The
23 parent itself had -- Christiana Care
24 Corporation had a LLC relationship with

DEMORE

1 Jefferson Health System.

2 Q. That brings me to what I
3 guess we'll call the Christiana Care
4 Health System/Jefferson Health System
5 alliance, is that what you were referring
6 to? LLC?

7 A. The LLC is what I'm
8 referring to.

9 Q. For the purposes of this
10 deposition, to be clear, can we refer to
11 it as the Jefferson/Christiana alliance
12 and you'll know what I'm talking about
13 referring to the LLC?

14 A. To me alliance is much
15 broader. If you refer to it as the LLC
16 then I could -- it would be easier for me
17 to answer the questions.

18 Q. That's fair enough.

19 MR. BALAGUER: Why don't we
20 call it the Jefferson/Christiana
21 LLC.

22 MR. LEVIN: That's fine with
23 me.

24 BY MR. LEVIN:

ELMORE

1 Q. The Jefferson/Christiana
2 LLC. Your counsel has provided us
3 documents in connection with the
4 Christiana/Jefferson LLC and I believe
5 this is an Article of Incorporation. Are
6 you familiar with the document? I'm not
7 going to ask you specific questions about
8 it, I just wanted to know if you reviewed
9 it before today?

10 A. I've seen the document
11 before several years ago.

12 Q. Did you review it in
13 preparation for today's deposition?

14 A. No.

15 Q. What was the business
16 objective of the LLC?

17 A. This happened a long time
18 ago so I'm just sort of remembering from
19 long-term memory. Primarily was to
20 initially explore opportunities -- we
21 each are two provider systems in Delaware
22 and Pennsylvania and we were looking at
23 our homecare division which involves V
24 and A, Visiting Nurse Homecare Division,

ELMORE

1 providing services to the Alfred I.
2 DuPont Children's Hospital, which is
3 located here in Delaware.

4 They were looking at
5 opportunities of how they had a similar
6 division at Jefferson that provided
7 similar home medical equipment to
8 homecare services to patients that were
9 being discharged from Alfred DuPont
10 Children's Hospital. And they were
11 looking to see how they could do
12 something together to better serve those
13 patients. That was the initial thought
14 that they had in working on the pediatric
15 program homecare and home medical
16 equipment.

17 Q. Did this LLC become a legal
18 entity?

19 A. Yes, the LLC was a legal
20 entity.

21 Q. When was the LLC
22 incorporated?

23 A. Sometime in the summer of
24 '99, as best I recall.

ELMORE

1 Q. In reviewing the document
2 your counsel prepared to you, you
3 yourself was on this board of the LLC?

4 A. Yes, that's correct.

5 Q. In reviewing the document,
6 there were four members of Christiana on
7 the board and four members of Jefferson;
8 is that correct?

9 A. As I recall, yes.

10 Q. In reviewing the document,
11 provided Christiana and Jefferson would
12 own a 50 percent interest in this LLC?

13 A. Yes, the way it was
14 structured. The way it was structured.

15 Q. Was money actually
16 contributed by both medical providers
17 towards the formation of the LLC?

18 A. Each ownership of the LLC
19 contributed 50 percent of the capital,
20 which was about \$50,000. 25 by
21 Christiana Care Corporation and 25 by
22 Jefferson Health System.

23 Q. This joint venture was to
24 provide home services or home services to

ELMORE

1 pediatric patients who had been
2 discharged from DuPont?

3 A. DuPont Children's Hospital,
4 that's correct.

5 Q. Did this LLC envision
6 providing homecare or services to
7 patients who were being discharged from
8 Jefferson University Hospital?

9 A. No.

10 Q. Were the patients that had
11 been discharged from DuPont Pennsylvania
12 residents?

13 MR. BALAGUER: Were any of
14 them Pennsylvania residents?

15 MR. LEVIN: Yes.

16 THE WITNESS: I'm sure some
17 of them were.

18 BY MR. LEVIN:

19 Q. What was Christiana's role
20 going to be in this LLC? How was it
21 going to work?

22 A. Well --

23 Q. From Christiana's
24 perspective?

ELMORE

1 A. -- the original business
2 plan, as I mentioned, was the pediatric
3 at Alfred I. DuPont Children's Hospital.
4 That business plan never got implemented,
5 so what was thought of being the
6 opportunity did not materialize.

7 Q. How many steps were taken
8 before the business plan ceased to be
9 implemented?

10 A. I'm not sure how you mean
11 how many steps were taken.

12 Q. Okay. All right. I'll
13 break it down. The business was
14 registered as a corporation, the LLC,
15 correct?

16 A. Yes, it was incorporated.
17 That's correct.

18 Q. It was registered to do
19 business in Pennsylvania, correct?

20 A. It was incorporated, I
21 believe, in Delaware.

22 Q. Was it registered with the
23 Pennsylvania Corporation Bureau?

24 A. Yes. If I recall there was

ELMORE

1 a registration.

2 Q. Was an office in
3 Pennsylvania given as a registered
4 address?

5 A. I believe so. In order to
6 have that, yes, you had to have a
7 Pennsylvania office.

8 Q. I'll submit to you that that
9 was in Radnor, Pennsylvania, does that
10 refresh your memory?

11 A. It was probably the
12 Jefferson Health System office in Radnor.

13 Q. That is correct. At that
14 facility in Radnor were there offices set
15 up that where Health System employees
16 were going to work -- come to work
17 everyday?

18 A. No.

19 Q. What activities were going
20 to occur at the Radnor address?

21 A. My recollection it was just
22 a holding spot for the potential business
23 plan. If it got approved it was just
24 going to be a holding address for that

ELMORE

1 service which never got implemented.

2 Q. What do you mean by holding
3 address?

4 A. The Radnor office where it
5 was registered.

6 Q. Well, these services were
7 going to be provided by nurses, correct?

8 A. This was going to be home
9 medical equipment.

10 Q. Home medical equipment?

11 A. Or home nurse visits for
12 patients discharged from Alfred I. DuPont
13 Children's Hospital.

14 Q. Let's start with the nurses.
15 They come, a child is discharged from
16 Alfred DuPont with, say, a brain injury,
17 the child required a feeding tube, just
18 as an example, I'm familiar with DuPont,
19 it's a fine organization.

20 The child is discharged
21 home. The nurse comes to the house,
22 shows the parents how to set up a feeding
23 tube, for example, who employs the nurse
24 -- or who was going to employ the nurse?

ELMORE

1 A. Where is the patient?

2 Q. The patient is in
3 Pennsylvania. Who would employ the
4 nurse?

5 A. It's a tricky question.

6 Q. Why?

7 A. It depends on who the
8 insurance carrier is as to who they
9 authorize to service that patient then
10 once they're going to be discharged to
11 home.

12 Q. Were there insurance
13 carriers that would have authorized
14 Jefferson nurses to come to those
15 children's homes?

16 A. Probably.

17 Q. In addition to providing
18 individuals to come to the children's
19 homes there would have been a provision
20 of medical equipment, is that true?

21 A. Probably, yes.

22 Q. Of the two medical
23 providers, Jefferson or Christiana, who
24 would have provided the medical equipment

ELMORE

1 to the children's homes?

2 A. It was dependent upon which
3 insurance company the contract was sold
4 in. And if it was a Delaware Health Plan
5 that had a member that lived in
6 Pennsylvania -- the patient lived in
7 Pennsylvania it would have been more than
8 likely Jefferson would have provided it.

9 It could have been
10 Christiana could have provided it. It's
11 up to the insurance company as to who
12 they authorize, who's in their network
13 providers and who has the specialty
14 equipment they need.

15 Q. Then from your answer I'm
16 taking that if it was a Pennsylvania
17 provider -- health insurance provider and
18 that health insurance provider had a
19 Pennsylvania resident, the medical
20 equipment would have come from Jefferson?

21 A. I believe, yes.

22 Q. What's that, sir?

23 A. Yes, probably.

24 Q. This sounds like a good

ELMORE

1 went forward with that type of
2 opportunity, there was no contacts being
3 made, there was no need. There was no
4 businesses.

5 Q. Were there any meetings
6 between, say, a representative from the
7 visiting nurses and Christiana and
8 visiting nurses organization at
9 Jefferson?

10 A. In what time frame?

11 Q. In that year-and-a-half.

12 A. During that year,
13 year-and-a-half?

14 Q. Uh-huh.

15 A. Yes, there were meetings
16 from both Jefferson and Christiana
17 Visiting Nurses Associations, homecare
18 medical equipment divisions discussing
19 the business plan.

20 Q. Fair enough. Were you
21 present at the meetings?

22 A. No.

23 Q. Were records kept of those
24 meetings?

ELMORE

1 A. I'm not aware of any.

2 Q. Where were the meetings
3 being held?

4 A. Most of our meetings were
5 rotated. Depending on when they had the
6 meeting we rotate between here in
7 Wilmington and at Radnor.

8 Q. At Jefferson Health Systems'
9 office in Radnor?

10 A. That's correct.

11 Q. Do you know during that
12 year-and-a-half how many such meeting
13 there were between the two medical
14 providers, visiting nurses
15 representatives?

16 A. I would not know exactly,
17 no.

18 Q. That's fair. Could you
19 estimate for me?

20 A. Well, probably two to four.

21 Q. Do you know who ran those
22 meetings?

23 A. No.

24 Q. Do you know the name of the

ELMORE

1 Christiana visiting nurse representative
2 who would have been present at these
3 meetings?

4 A. Yes. We've had several
5 changes in that division so I say yes and
6 if you'd ask me then for a name I'd have
7 to think twice as far as the present and
8 retired. And I'm not sure he was
9 involved. The chief operating officer at
10 that time is still there and so she
11 probably was involved.

12 And the home medical
13 equipment individual, we've had two or
14 three changes in that position so I would
15 not recall which one from the home
16 medical equipment was involved, but there
17 were probably three people out of that
18 division would have probably been
19 involved.

20 Q. What's the name of the COO?

21 A. The COO is Ronda Ketcham,
22 K-E-T-C-H-A-M.

23 Q. Do you know who her mirror
24 is at Jefferson?

ELMORE

1 A. No.

2 Q. Do you know the names of any
3 Jefferson individuals who would have been
4 present at these meetings?

5 A. No, because I did not know
6 them that well.

7 Q. Fair enough. Medical
8 equipment representative from Christiana,
9 you said there were two or three, could
10 you give me those names?

11 A. I don't recall. The first
12 individual that was in that position left
13 our employment. And there was a young
14 lady, I can't recall her name. I can
15 probably find it.

16 MR. LEVIN: Ask that you do
17 so.

18 BY MR. LEVIN:

19 Q. Are there any individual
20 names that you can recall from Christiana
21 medical equipment who would have been
22 present at these meetings?

23 A. Repeat the question again?

24 Q. Sure. Any names you can

ELMORE

1 recall from Christiana who would have
2 been supervising medical equipment or
3 would have been the medical equipment
4 person?

5 A. It would have been the
6 director of that division who's name I am
7 not recalling right now.

8 Q. Forgive me if I asked you
9 this. Do you know the name of the
10 Christiana visiting nurse representative
11 who would have been present at these
12 meetings?

13 A. Probably the chief operating
14 office.

15 Q. Ketcham?

16 A. Rhonda Ketcham.

17 Q. This business would have --
18 its headquarters would have been at the
19 Radnor address, correct?

20 MR. BALAGUER: Objection to
21 the form of the question. You can
22 answer.

23 BY MR. LEVIN:

24 Q. Where would this business

ELMORE

1 have been headquartered?

2 A. Are you talking about the
3 LLC or the business plan?

4 Q. The LLC, I'm sorry.

5 A. It was incorporated in
6 Delaware. I was responsible for the
7 accounting records for the corporation
8 and we rotated meetings of the board
9 between the two offices of the systems.

10 Q. You rotated between Delaware
11 and the Radnor office?

12 A. That's correct.

13 Q. Where would the interface
14 with the visiting nurses, the medical
15 equipment providers, where would that
16 have occurred?

17 A. Let me make sure I
18 understand your question. When we were
19 doing the business planning process the
20 people that were involved, where would
21 those meetings have occurred?

22 Q. Yes. Where those meetings
23 would have occurred.

24 A. They would have occurred at

ELMORE

1 entities that Care Corporation owns is an
2 insurer, MidAtlantic Health Care; is that
3 correct?

4 A. Christiana Care Health Plan.

5 Q. What is the relationship
6 between MidAtlantic Health Plan and
7 Christiana Care Health Plan?

8 A. MidAtlantic is the
9 commercial product that they offer for
10 commercial carriers. The other product
11 they offer was a Medicaid contract for
12 Medicaid members in Delaware.

13 Q. So MidAtlantic is the name
14 of the --

15 A. Commercial.

16 Q. Pardon me?

17 A. MidAtlantic Health Plan is a
18 commercial product, developers insured,
19 produced and administrative services to
20 employers for their employee health
21 benefits.

22 Q. You mentioned another
23 entity?

24 A. Health Initiatives?

ELMORE

1 Q. No.

2 A. First State Health Plan.

3 Q. That's it.

4 A. First State Health Plan --

5 Q. First State Health Plan by
6 Delaware the first state.

7 A. First State Health Plan, and
8 that primarily is a Medicaid contract
9 with the state to provide Medicaid
10 coverage.

11 Q. Does First State do any
12 business in Pennsylvania?

13 A. It's contract was with
14 Delaware Medicaid program.

15 Q. Is it contracted with any
16 entity, corporation, local municipality
17 in Pennsylvania?

18 A. It has provider contracts.
19 Christiana -- First State Health Plan and
20 Christiana MidAtlantic Health Plan both
21 have provider contracts with many
22 providers.

23 Q. When you mean providers, you
24 mean healthcare providers?

ELMORE

1 A. Healthcare providers,
2 correct.

3 Q. Are some of these healthcare
4 providers Pennsylvania hospitals, doctors
5 offices?

6 A. Pennsylvania Hospital and
7 physicians, as well as New Jersey and
8 Maryland.

9 Q. Being more specific then,
10 which hospitals in Philadelphia does
11 MidAtlantic have contracts with?

12 A. The best I can recall, the
13 listing that was in the provider
14 handbook, and again, I --

15 Q. The best you can recall,
16 sir.

17 A. There were probably all the
18 Jefferson Health Systems, Crozer Chester
19 and some Quaternary services at the
20 University of Pennsylvania Hospital.

21 Q. Some what, sir?

22 A. Quaternary services.

23 Q. New term for me. What is
24 it?

ELMORE

1 A. Heart transplants, organ
2 transplants.

3 MR. BALAGUER: Could you
4 spell that, Quaternary?

5 THE WITNESS: I'd ask
6 assistance from my counsel.

7 BY MR. LEVIN:

8 Q. Those Quaternary services
9 are with The Hospital of the University
10 of Pennsylvania?

11 A. Yes.

12 Q. Did MidAtlantic also have
13 these contracts with these hospitals in
14 2002?

15 A. Yes, I think so.

16 Q. In addition to hospitals in
17 Philadelphia there were physician
18 practices that MidAtlantic had contracts
19 with, correct?

20 A. Yes, that's correct.

21 Q. Some of the information that
22 I received indicated that there were
23 several physicians' practices in
24 Philadelphia that MidAtlantic had

ELMORE

1 contracts with, do you know how many or
2 can you estimate for me how many?

3 MR. BALAGUER: You're
4 talking about Philadelphia now not
5 Pennsylvania.

6 MR. LEVIN: Yes.

7 BY MR. LEVIN:

8 Q. Just Philadelphia I'm
9 narrowing it.

10 A. I couldn't even estimate it.
11 It could have been two to 600. I have no
12 idea.

13 Q. 200 to 600?

14 A. Possibly.

15 Q. MidAtlantic advertises on
16 its web site a listing of these hospitals
17 and physician practices in Philadelphia,
18 is that true?

19 A. I'm not sure what they have
20 on the web site.

21 Q. Have you seen their web
22 site?

23 A. If I have it's been a long
24 time.

ELMORE

1 Q. When these 200 to 600
2 Philadelphia doctors and medical
3 practices bill MidAtlantic for their
4 services, MidAtlantic has records of
5 that, correct?

6 A. Correct.

7 Q. Obviously. If I wanted to
8 obtain those records how would I get
9 them?

10 A. You probably would have to
11 approach counsel.

12 Q. For MidAtlantic?

13 A. For MidAtlantic, for
14 Christiana Care Health Plan. Because
15 there are HIPAA regulations that would
16 require consents for leases and things
17 like that probably could access billing
18 formation.

19 Q. Do you know when MidAtlantic
20 began its affiliation with these
21 hospitals in Philadelphia?

22 MR. BALAGUER: Objection to
23 the form of the question. You can
24 answer.

ELMORE

1 THE WITNESS: Well, I would
2 say they probably contracted with
3 various hospitals probably back in
4 1996 when we started the Medicaid
5 program because a lot of the
6 Medicaid needed other services
7 that we could not provide within
8 Delaware or DuPont Children's
9 Hospital and so we had to have for
10 the Medicaid contract other backup
11 hospitals that could provide those
12 services.

13 So '96, '97, '98, somewhere
14 in there, when the Medicaid
15 program started had contracts with
16 a lot of the providers in the
17 Pennsylvania market.

18 BY MR. LEVIN:

19 Q. They would be the hospitals
20 you mentioned and these 200 to 600
21 physicians; is that correct?

22 A. Initially it was probably a
23 fewer number of those. Later on it was
24 probably a larger number because it takes

ELMORE

1 a long time to get contracts with
2 providers out of state.

3 Q. Do you know what percentage
4 of the billings for MidAtlantic come from
5 Pennsylvania physicians and hospitals?

6 A. A small percentage. I don't
7 have an exact number. Very small.

8 Q. You say it's a small
9 percentage, what percentage?

10 A. I'd say probably 10 percent
11 or less.

12 Q. When you say that you have a
13 number in your head, can you tell me in
14 an estimate dollar amount what is the
15 percentage that MidAtlantic bills from
16 hospitals and physicians in the, we'll
17 call it, Philadelphia market?

18 A. I probably couldn't give you
19 a number.

20 Q. You gave me a percentage,
21 ten percent, what do you base that on?

22 A. If you look at where the
23 place of business, primarily the Medicaid
24 contract, they're all -- unless they have

ELMORE

1 transportation they don't go out of state
2 for services unless they're burn
3 patients, a baby that even Alfred I.
4 DuPont can not take care of or an adult,
5 which again, the Medicaid, some adults in
6 there and sometimes they need organ
7 transplants and things like that.

8 I know that we look at in
9 the health plan how much of the business
10 goes out of state because primarily the
11 contracts are focusing on Delaware
12 providers and we look and see how much
13 goes into the various states.

14 Part of it is I know how
15 much our business comes from outside of
16 the state too as we provide services too.

17 Q. So with those, I think, four
18 Philadelphia hospitals and those 200 to
19 600 physicians in Philadelphia, you are
20 telling that -- you're estimating that
21 only 10 percent of MidAtlantic's billing
22 comes from those providers?

23 A. About 10 percent or less.

24 Q. Can you tell me what the

ELMORE

1 referring to and other relationships, is
2 that we've always had a teaching
3 relationship with Jefferson that predates
4 me. And that would be my assumption as
5 to why it's on here.

6 Q. You handed me a document,
7 we'll have this marked. This is a
8 document generated by Christiana?

9 A. Yes. It's part of our
10 official bond statement.

11 Q. Tell me what this document
12 discusses.

13 A. It just explains how back in
14 the early '60s the State of Delaware,
15 which I wasn't here at that point in
16 time, general assembly passed legislation
17 to create the DIMER program, Delaware
18 Institute of Medical Education and
19 Research.

20 And it was a relationship
21 between the State of Delaware and
22 Jefferson Medical College and it provides
23 funding to Jefferson -- the state
24 provides funds for a certain number of

ELMORE

1 medical student slots in their program up
2 there.

3 And it also provides for the
4 opportunity for those clinical students
5 that are in the medical college to rotate
6 down here to Christiana Hospital or to
7 Wilmington Hospital under our residency
8 program where our residents then they can
9 work alongside our residents and receive
10 education and training. And that's the
11 purpose of the medical school
12 affiliation.

13 Q. Does Christiana or
14 Wilmington Hospital have a medical
15 school?

16 A. No.

17 Q. So then you have Jefferson
18 students rotating down at Christiana for
19 say a obstetrical residency, for example?
20 I'm just using that as a medical.

21 A. Well, first of all, we have
22 our own residency program. We're a
23 community teaching residency program. We
24 have over 200 residents.

ELMORE

1 It's our program, it's not
2 Jefferson and their medical students
3 rotate down here. Some of the residents
4 may rotate down here but usually it's
5 their medical students.

6 Q. Years one, two, three and
7 four, correct? They're students years
8 one, two, three and four?

9 A. The residents' programs are
10 Program one, two, three or four years.

11 Q. Now, you said that this is a
12 community teaching program here?

13 A. Yes.

14 MR. BALAGUER: Christiana
15 is.

16 THE WITNESS: Christiana.

17 BY MR. LEVIN:

18 Q. I'm sorry, Christiana. What
19 do you mean by community teaching
20 program?

21 A. Well, first of all, most
22 residency programs if they're not
23 affiliated through the university,
24 they're there --

ELMORE

1 Q. What university are you
2 referring to?

3 A. A medical school.

4 Q. Okay. I'm sorry.

5 A. In other words, if it's a
6 residency program through the university
7 like Jefferson Health System or through
8 the University of Pennsylvania, we don't
9 have a medical college here in Delaware
10 and therefore we are considered a
11 community teaching residency program.

12 Q. Do any of the we'll call
13 them Christiana students rotate to
14 Jefferson?

15 MR. BALAGUER: You mean
16 residents.

17 BY MR. LEVIN:

18 Q. Residents, I'm sorry.

19 A. It's possible. I don't know
20 what their schedules are but it's
21 possible they could rotate up there for a
22 class or a specific service.

23 Q. Do any Christiana doctors --
24 when I mean Christiana, I mean Christiana

ELMORE

1 or Wilmington Hospital doctors teach at
2 Jefferson Medical College?

3 MR. BALAGUER: Now you're
4 talking about independent staff.
5 People who have staff privileges
6 at Christiana.

7 MR. LEVIN: Yes. Thank you.

8 THE WITNESS: I believe --
9 that's why I printed this out
10 because I'm not as familiar with
11 the teaching relationships with
12 the whole program and it says in
13 here that some of our faculty in
14 our program also provide -- are on
15 faculty appointments up at
16 Jefferson.

17 BY MR. LEVIN:

18 Q. So that would be yes?

19 A. It would be yes.

20 Q. Do you know for how long
21 your faculty has been providing teaching
22 to Jefferson?

23 A. I would not know.

24 Q. Before 2002?

ELMORE

1 A. I would have to say we
2 employ physicians and we have practices
3 that we operate.

4 Q. Do you know how many
5 practices you operate? I won't pin you
6 down, just estimate for me.

7 A. I'm going to estimate we
8 probably have 40 primary care physicians.
9 Primary care physicians that provide
10 services from a patient care side that
11 aren't necessarily in medical education.

12 Q. Do you employ physicians who
13 are involved in medical education?

14 A. Yes.

15 Q. Do any of those physicians
16 that you employ that are involved in
17 medical education have teaching
18 appointments at Jefferson or any other
19 Philadelphia hospital?

20 A. I don't know. Probably.
21 Because on this statement here as far as
22 who has dual faculty appointments, they
23 could be private community physicians
24 that are on our medical staff. It could

ELMORE

1 be some of our faculty. I'm not sure.

2 Q. How would I find that out?

3 A. Dr. Little.

4 Q. Dr. Little? What is his
5 title?

6 A. Vice president for medical
7 education.

8 Q. The document that you gave
9 -- let's just mark it.

10 MR. LEVIN: Mark it as D-1.

11 This is D-2.

12 - - -

13 (Whereupon the documents
14 were marked for identification as
15 Exhibits D-1 and D-2.)

16 - - -

17 MR. LEVIN: And while we're
18 marking, mark as D-3, which we
19 previously discussed.

20 - - -

21 (Whereupon the document was
22 marked for identification as
23 Exhibit D-3.)

24 - - -

Exhibit B

LEXSEE 2003 U.S. DIST LEXIS 7589

PARIS CLOUD, Plaintiff, v. AMQUIP CORPORATION, Defendant.

Civil Action No. 02-1316-SLR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2003 U.S. Dist. LEXIS 7589

April 28, 2003, Decided

DISPOSITION: [*1] Motion to dismiss complaint denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sued for negligence in a Texas state court. Defendant filed a special appearance motion in that case. Defendant's motion was denied by the trial court but upheld by the state court of appeals. Plaintiff filed the instant federal action on July 24, 2002. Defendant moved to dismiss the complaint, arguing that plaintiff's claim was time-barred.

OVERVIEW: Defendant argued that plaintiff's claim was untimely as his injury was sustained on February 24, 1999 and, under Delaware's two-year limitations period for negligence, suit had to have been brought prior to February 24, 2001. Plaintiff countered that Delaware's Savings Statute (DSS), Del. Code Ann. tit. 10, § 8118(a), preserved his claim. Defendant argued that, because plaintiff originally filed suit in Texas, DSS did not apply to foreign-filed claims. Delaware state courts had held that DSS applied to actions commenced beyond the boundaries of the state of Delaware. Plaintiff brought the present action because of the failure to obtain personal jurisdiction over defendant in a foreign state. There was no indication that defendant had suffered prejudice by the consecutive filings. The court held that DSS applied to actions initially brought in a foreign jurisdiction and dismissed for reasons other than on the merits of the claim. The court ruled that plaintiff brought his action within the one year time period allowed for the initiation of a subsequent suit by DSS.

OUTCOME: The court denied defendant's motion to dismiss.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Motions to Dismiss

[HN1] In analyzing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint. Claims may be dismissed pursuant to a Fed. R. Civ. P. 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. The moving party has the burden of persuasion.

*Torts > Negligence > Negligence Generally
Governments > Legislation > Statutes of Limitations > Time Limitations*

[HN2] Delaware's applicable statute of limitations for negligence is two years. 10 Del. Code Ann. tit. 10, § 8119.

Civil Procedure > Pleading & Practice > Defenses, Objections & Demurrers > Failure to State a Cause of Action

[HN3] While generally, a statute of limitations defense cannot be used in the context of a Fed. R. Civ. P. 12(b)(6) motion, an exception can be made when the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleadings.

Governments > Legislation > Statutes of Limitations > Time Limitations

[HN4] See Del. Code Ann. tit. 10, 8118(a).

Governments > Legislation > Statutes of Limitations > Extension & Revival

Civil Procedure > Pleading & Practice > Service of Process > Time Limitations

[HN5] Delaware state courts that have spoken directly to the issue of whether the Delaware Savings Statute, Del. Code Ann. tit. 10, 8118(a), applies to actions commenced beyond the boundaries of the State have concluded that it does.

COUNSEL: For PARIS CLOUD, plaintiff: James J. Woods, Jr., Connolly, Bove, Lodge & Hutz, Wilmington, DE.

For AMQUIP CORPORATION, defendant: Louis J. Rizzo, Jr., Reger & Rizzo, LLP, Wilmington, DE.

JUDGES: Sue L. Robinson, United States District Judge.

OPINIONBY: Sue L. Robinson

OPINION:

MEMORANDUM ORDER

I. INTRODUCTION

Plaintiff initially filed suit against defendant and others on January 7, 2000 in Harris County, Texas. (D.I. 13, P 9) The suit alleged that negligence on the part of defendant caused plaintiff's injuries. (Id. at Ex. B) Defendant filed a special appearance motion on or about February 4, 2000. (Id. at PP 12, 13) The trial court in Texas denied the motion, but it was upheld by the Court of Appeals for the First District of Texas on February 7, 2002. (Id. at PP 14, 18) Plaintiff filed his original complaint in this court on July 24, 2002. (Id. at P 19) Currently before the court is defendant's motion to dismiss plaintiff's complaint pursuant to *Fed.R.Civ.P. 12(b)(6)* ("*Rule 12(b)(6)*"). (D.I. 12)

For the reasons that follow, the court shall deny defendant's motion. [*2]

II. BACKGROUND

On February 24, 1999, plaintiff was injured on a job site accident in Delaware City, Delaware. (D.I. 12 at 4) Plaintiff alleges that an employee of defendant improperly operated a forklift causing plaintiff to be injured during the disassembly of a crane. (Id.) Plaintiff seeks compensation for medical expenses, loss of earning capacity, and other damages. (Id., Ex. A at 3-4)

III. STANDARD OF REVIEW

[HN1] In analyzing a motion to dismiss pursuant to *Rule 12(b)(6)*, the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc.*, 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint."

Id. Claims may be dismissed pursuant to a *Rule 12(b)(6)* motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). [*3] The moving party has the burden of persuasion. See *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991).

IV. DISCUSSION

Defendant argues that plaintiff's claim is time barred as his injury was sustained on February 24, 1999 and suit had to have been brought prior to February 24, 2001. n1 (D.I. 12 at 5-6) Plaintiff counters that Delaware's Savings Statute, 10 *Del.C. § 8118* n2, preserves his cause of action. (D.I. 13) Defendant claims that the Savings Statute is inapplicable here because plaintiff originally filed suit in Texas and the statute does not apply to foreign-filed claims. (D.I. 12 at 6-7)

n1 [HN2] Delaware's applicable statute of limitations is two years. 10 *Del.C. § 8119*. The court acknowledges that [HN3] while generally, a statute of limitations defense cannot be used in the context of a *Rule 12(b)(6)* motion, an exception can be made when the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleadings. *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994).

[*4]

n2

[HN4] If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination

of the original action, or after the reversal of the judgment therein.

10 Del.C. § 8118(a).

Defendant relies on *Sorensen v. Overland Corp.*, 142 F. Supp. 354 (D. Del. 1956) for the proposition that Delaware's Savings Statute "does not encompass prior actions arising out of foreign courts." *Id.* at 363. [*5] That reasoning was only one of several grounds for dismissal in that case and this court declines to follow that court's logic.

[HN5] Delaware state courts that have spoken directly to the issue of whether the Delaware Savings Statute applies to actions commenced beyond the boundaries of the State have concluded that it does. In *Leavy v. Saunders*, 319 A.2d 44 (Del. Super. Ct. 1974), the court held that "the language of § [8118] does not show an intention to limit the section solely to successive actions brought in the courts of this State," because it "is silent as to place of commencement." *Id.* at 47. The court in *Leavy* reasoned that "the real function of a statute of limitation[s] is to protect prospective litigants against stale claims." *Id.* The court concluded that it would be "difficult to justify the conclusion that this exception to the statute of limitations should be applied on the basis of judicial jurisdiction or territory." *Id.*

Defendant also relies on *Morris v. Wise*, 1955 OK 297, 293 P.2d 547 (Okla. 1955) to support its claim that savings statutes do not apply to causes of action initially brought in a foreign jurisdiction. [*6] *Id.* at 550-51. This reliance is misplaced. Delaware's statute is different from the Oklahoma statute. The Oklahoma statute specifically limits the applicability of the Oklahoma savings statute to "actions commenced within this state." 12 O.S. 1951 §

100. Therefore, *Morris* is inapplicable to the present case.

Additionally, this court finds that the Delaware Supreme Court has held that the purpose of the Delaware Savings Statute is "to mitigate against the harshness of the defense of the statute of limitations raised against a plaintiff who, through no fault of his own, finds his cause technically barred by the lapse of time." *Giles v. Rodolico*, 51 Del. 143, 140 A.2d 263, 267, 1 Storey 143 (Del. 1958). In that case, as well as the *Leavy* case cited above, the cause of action was dismissed because of failure to obtain personal jurisdiction over the defendant. *Id.*; *Leavy*, 319 A.2d at 47-48. The present action was brought in this court because of the failure to obtain personal jurisdiction over defendant in a foreign state. (D.I. 13) As in the cases cited above, defendant has been aware of the proceedings and there is no indication defendant [*7] has suffered harm or prejudice by the consecutive filings. See *Leavy*, 319 A.2d at 48.

VI. CONCLUSION

The court holds that the Delaware Savings Statute applies to actions initially brought in a foreign jurisdiction and dismissed for reasons other than on the merits of the claim. The court finds that plaintiff brought this action against defendant within the one year time period allowed for the initiation of a subsequent suit by the Savings Statute.

Therefore, at Wilmington this 28th day of April, 2003;

IT IS ORDERED that defendant's motion to dismiss plaintiff's complaint pursuant to *Rule 12(b)(6)* (D.I. 12) is denied.

Sue L. Robinson

United States District Judge

LEXSEE 1981 DEL. SUPER LEXIS 818

Mary Welch Gaspero v. Walter M. Douglas, Executor of the Estate of Fred T. Douglas

No. 80C-DE-45

Superior Court of Delaware, New Castle

1981 Del. Super. LEXIS 818

Submitted: September 14, 1981

November 6, 1981, Decided

COUNSEL: [*1]

Jeffrey M. Weiner, Esquire, Bayard, Brill & Handelman, P.A., Wilmington, DE.

Joseph A. Hurley, Esquire, Wilmington, DE.

Richard Galperin, Esquire, Flanzer & Isaacs, Wilmington, DE.

JUDGES:

Andrew D. Christie, Judge.

OPINIONBY:

CHRISTIE

OPINION:

Andrew D. Christie

This is an action upon personal injuries caused by an automobile accident which occurred on August 13, 1977. A complaint was originally filed on June 22, 1979. Plaintiff, Mary Gaspero, attempted to serve the executor of the estate of Fred T. Douglas (the defendant) under the non-resident motorist statute (*10 Del.C. § 3112*) but service was ineffective and the original action was dismissed by a prior order of this Court dated December 4, 1980.

On December 8, 1980 (more than three years after the accident but only four days after the first action was dismissed) Mrs. Gaspero filed a new complaint based on the same cause of action and this time effective service was made upon defendant Walter Douglas, Executor of the estate of Fred T. Douglas. A motion to dismiss the new suit has been filed by Mr. Douglas on the ground that the applicable two-year statute of limitations (*10 Del.C. § 8119*), as well as principles of res judicata [*2] and estoppel, bar this action. The purpose of this letter is to announce the Court's ruling on defendant's motion to dismiss.

Mary Gaspero relies upon the so-called savings statute (*10 Del.C. § 8118*, formerly *10 Del.C. § 8117*) as providing her with the authority to file and pursue her latest complaint. This statute provides in pertinent part:

§ 8118. Other savings.

(a) If in any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; or if after a verdict for the plaintiff, the judgment shall not be given for the plaintiff because of some error appearing on the face of the record which vitiates the proceedings; or if a judgment for the plaintiff is reversed on appeal or a writ of error; a new action may be commenced, for the same cause of action, at any time within one year after the abatement or other determination of the original action, or after the reversal of the judgment [*3] therein.

* * *

It is clear that, but for the exception which this savings statute may create in this case, Mrs. Gaspero's action would be barred by the statute of limitations contained in *10 Del.C. § 8119*. The statute of limitations provides that personal injury claims must be brought within two years "from the date upon which it is claimed that such alleged injuries were sustained." The question thus presented is whether the savings statute applies to this case. It is the plaintiff's position that any prior difficulties encountered in properly serving process upon the defendant must be regarded as resulting in an "abatement" of the original timely complaint within the meaning of *10 Del.C. § 8118*. n1

n1 As a general rule, any informality, irregu-

larity, or defect in the terms, forms or structure of a writ or summons, or in the service or return of process, which is sufficient to render it invalid, is ground for abating the writ. *Howmet Corporation vs. City of Wilmington, Del. Super.*, 285 A.2d 423 (1971); See C.J.S., Abatement and Revival, § 87.

As discussed in this Court's letter opinion dated December 4, 1980, the service of the complaint originally [*4] filed by the plaintiff was ineffective because plaintiff failed to comply with the technical provisions of 10 Del.C. § 3112 regarding service of process on non-resident motorists. Specifically, the notice sent by the plaintiff to the defendant was deficient because copies of the papers served on the Secretary of State could not have been enclosed, as required by § 3112(b), since service had not taken place. The attorney who then represented plaintiff's learned of this error sometime in December of 1979. Had the attorney acted diligently and promptly at that time in perfecting service by having an alias summons issue, the statute of limitations might have been regarded as having been tolled. *Biby vs. Smith, Del. Super.*, 272 A.2d 116 (1970); *Sines vs. Wyatt, Del. Super.*, 281 A.2d 499 (1971). Plaintiff's attorney waited over a month, however, before taking any action. Because of the time lapse, he was then forced to seek leave of the Court to have an alias summons issue. Permission was summarily granted by the Court on February 8, 1980. The writ was thereafter issued and steps were taken to correctly comply with the statutory provisions regarding service of process. Under [*5] all of these circumstances I concluded that service of process had not been obtained within a reasonable time after the filing of the original complaint and that the only effective service of process occurred after the time specified in the statute of limitations had run.

I

The savings statute was not before the Court at the time of the earlier ruling. This statute has been described as "designed to mitigate against the harshness of the defense of the statute of limitations against a plaintiff who, through no fault of his own, finds his cause technically barred by lapse of time." *Giles vs. Rodolico, Del. Supr.*, 140 A.2d 263, 267 (1958); Annot. 6 ALR3d 1043 (1966). It is remedial in nature and is to be liberally construed. *Purnell vs. Dodman, Del. Super.*, 311 A.2d 877 (1973). The statute has been said to "embrace cases which equitably ought to be covered by it." *Id.*, at 880. Where a defendant's insurance company is in contact with a plaintiff's counsel and knows of problems encountered in effecting service, a defendant cannot be prejudiced by a plaintiff's improper service of process. *Giles, supra*; *Purnell, supra*; *Viars vs. Surbaugh, Del. Super.*, 335 [*6] A.2d 285 (1975).

Plaintiffs seeking relief under the savings statute in

these circumstances must meet two requirements: (1) they must have commenced an action before the statute of limitations barred the action, and (2) the writ which subsequently issues must have been "abated." In this case it is clear that plaintiff duly commenced her action by filing the complaint n2 prior to the expiration of the statute of limitations. It is also clear that the writ which thereafter issued was rendered invalid by virtue of an attorney's failure to comply with the technical provisions of 10 Del.C. § 3112. It would therefore seem that the plaintiff meets the requirements of the savings statute.

n2 Superior Court Civil Rule 3(a) states: "Except amicable actions, an action is commenced by filing with the Prothonotary a complaint or, if required by statute, a petition or statement of claim, all hereafter to be referred to as a 'complaint' and a praecipe directing the Prothonotary to issue the writ specified therein."

I am also of the opinion that the equities of the case weigh in favor of the plaintiff. As mentioned in this Court's earlier letter opinion, the record shows that both the [*7] deceased and his insurer had been aware of the existence of a claim by a few days after the accident. Thereafter, the plaintiff's attorney engaged in correspondence with the deceased's insurer. The defense of the case has suffered no pertinent prejudice as a result of the difficulties plaintiff's attorney has encountered in obtaining proper service on the defendant.

I know that I have previously found that the plaintiff's attorney was remiss in not promptly effecting proper service of process once the inadequate nature of the original service of process became apparent. This finding was significant under the rules of law discussed in this Court's prior letter opinion. The present cause of action has been filed under a different statute. The equitable policies underlying the savings statute convince me that under the circumstances here present substantive rights should not be forfeited where the deceased and his insurer had actual (albeit defective) notice of the existence of an outstanding claim shortly after the accident occurred, and the statute was invoked as soon as the Court ruled that the earlier attempts at service were ineffective. I also note that the carrier had notice that [*8] plaintiff had filed suit and that the defect in the service was a technical defect.

II

Defendant argues that the plaintiff should be barred by principles of res judicata and estoppel from instituting this second cause of action. *Ezzes vs. Ackerman, Del. Supr.*, 234 A.2d 444 (1967). Defendant states that the plaintiff should have asserted the savings statute, if at all, in the prior litigation, and that after losing a case on one theory

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he may not pursue a different theory in a second action based on the same proof which has been rejected in the first action.

The savings statute confers upon a plaintiff the independent right to bring a second cause of action where a prior timely action has been dismissed because of a failure to perfect service of process within the period of limita-

tions. See *Giles, supra*; *Purnell, supra*. The doctrine of res judicata does not apply in this case because the savings statute, as the Court in Purnell noted, "grants an absolute right to the litigant to elect renewal." *Id.*, at 879. Under the circumstances I find no estoppel.

Defendant's motion to dismiss is denied. IT IS SO ORDERED.

CERTIFICATE OF SERVICE

I certify that on this 6th day of September, 2005, that I electronically filed the attached Appendix with the Clerk of the Court using CM/ECF, which will send notification of such filing to the following:

Natalie L. Palladino, Esq.
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